COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.7.2006
COM(2006) 399 final

2006/0135 (CNS)

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters

(presented by the Commission)

{SEC(2006) 949}
{SEC(2006) 950}

EXPLANATORY MEMORANDUM

1) grounds for and objectives of the proposal

The Treaty of Amsterdam sets out the objective of progressively establishing a common area of freedom, security and justice, amongst others by adopting measures in the field of judicial cooperation in civil matters. Pursuant to Article 65 of the Treaty, the Community shall adopt measures in the field of judicial cooperation in civil matters having cross-border implications insofar as they are necessary for the proper functioning of the internal market. Article 65 (b) specifically refers to measures "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction".

The harmonisation of conflict-of-law rules facilitates the mutual recognition of judgments. The fact that courts of the Member States apply the same conflict-of-law rules to determine the law applicable to a given situation reinforces the mutual trust in judicial decisions given in other Member States.[1]

The European Council has invoked the question of applicable law to divorce on two occasions. The European Council in Vienna requested in 1998 that the possibility of drawing up a legal instrument on the law applicable to divorce be considered within five years of the entry into force of the Treaty of Amsterdam.[2] More recently, the European Council called upon the Commission in November 2004 to present a Green Paper on the conflict-of-law rules in matters relating to divorce in 2005.[3]

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1 The Programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted on 30.11.2000, OJ C 12, 15.1.2000, p. 1.

2 The Vienna Action Plan, adopted by the European Council 3 December 1998, OJ C19, 23.01.1999, p.1.

3 The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4-5 November 2004.

4 Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L 160, 30.06.2000, p. 19.

General context

The growing mobility of citizens within the European Union has led to an increasing number of international couples, i.e. spouses of different nationalities, spouses who live in different Member States or who live in a Member State in which one or both of them are not nationals. In view of the high divorce rate in the European Union, applicable law and jurisdiction in matrimonial matters concern a significant number of citizens each year. Section 3 of the attached Impact Assessment contains statistics on the number of international divorces and marriages within the European Union.

Existing provisions in the area of the proposal

There are currently no Community rules in the field of applicable law in matrimonial matters. The first Community instrument adopted in the area of family law, Council Regulation (EC) No 1347/2000[4], set out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters as well as judgments on parental responsibility for children of both spouses given in the context of a matrimonial proceeding. It did not, however, include rules on applicable law.

The entry into force of Council Regulation (EC) No 2201/2003[5], which repealed and replaced Council Regulation (EC) No 1347/2001 as of 1 March 2005, did not entail any change in this respect. The question of applicable law was not invoked during the negotiations of this Regulation, which took over virtually unchanged the provisions on matrimonial matters from Council Regulation (EC) 1347/2000.

Council Regulation (EC) No 2201/2003 allows spouses to choose between several alternative grounds of jurisdiction. Once a matrimonial proceeding is brought before the courts of a Member State, the applicable law is determined on the basis of the national conflict-of-law rules of that State, which are based on very different criteria.

The majority of Member States determine the applicable law on the basis of a scale of connecting factors that seek to ensure that the proceeding is governed by the legal order with which it has the closest connection. Other Member States apply systematically their domestic laws ("lex fori") to matrimonial proceedings.

Objectives of the Proposal

The overall objective of this Proposal is to provide a clear and comprehensive legal framework in matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.

The current situation may give rise to a number of problems in matrimonial proceedings of an international nature. The fact that national laws are very different both with regard to the substantive law and the conflict-of-law rules leads to legal uncertainty. The great differences between and complexity of the national conflict-of-law rules make it very difficult for international couples to predict which law will apply to their matrimonial proceeding. The large majority of Member States do not provide any possibility for the spouses to choose applicable law in matrimonial proceedings. This may lead to the application of a law with which the spouses are only tenuously connected and to a result that does not correspond to the legitimate expectations of the citizens. In addition, the current rules may induce a spouse to "rush to court", i.e. to seise a court before the other spouse has done so to ensure that the proceeding is governed by a particular law in order to safeguard his or her interests. Finally, the current rules do not guarantee sufficient access to court.

The Proposal amends Council Regulation (EC) No 2201/2003 as regards jurisdiction and applicable law in matrimonial matters to attain the following objectives:

- **Consistency with the other policies and objectives of the Union**

The Proposal respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

2) Consultation of interested parties and impact assessment

- **Consultation of interested parties**

The Commission presented a Green Paper on applicable law and jurisdiction matters in divorce matters on 14 March 2005.[6] The Green Paper identified a number of shortcomings under the current situation and identified different possible policy options to address the problems. The options included status quo, harmonisation of the conflict-of-law rules, introducing a limited possibility for the spouses to choose the applicable law, revising the grounds of jurisdiction listed in Article 3 of Council Regulation (EC) No 2201/2003, revising Article 7 on residual jurisdiction of Council Regulation (EC) No 2201/2003, introducing a limited possibility for the spouses to choose the competent court,introducing a limited possibility to transfer a case and finally a combination of the different solutions.

The Commission received approximately 65 submissions in response to the Green Paper.[7]

In its opinion of 28 September 2005 on the Green Paper, the European Economic and Social Committee welcomed the initiative taken by the Commission.

The Commission organised a public hearing on 6 December 2005. An expert meeting was subsequently held on 14 March 2006. The discussions took place on the basis of a discussion paper drawn up by the services of the Commission.

The majority of the responses acknowledged the need to enhance legal certainty and predictability, to introduce a limited party autonomy and to prevent "rush to court". Certain stakeholders expressed concerns that the harmonisation of conflict-of-law rules would oblige courts to apply foreign law and that this may lead to delays and additional costs in matrimonial proceedings.

The consultation with interested parties has been taken into account in the preparation of this Proposal.

- **Collection and use of expertise**

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6 COM (2005) 82 final

7 The responses are published at the following address: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm

There was no need for external expertise.

- **Impact assessment**

The Commission has undertaken an impact assessment which is attached to the proposal. The Impact Assessment envisages the following options: (i) status quo, (ii) increased cooperation between Member States; (iii) harmonisation of the conflict-of-law rules including a limited possibility for spouses to choose the applicable law; (iv) revision of the rule on general jurisdiction of Council Regulation (EC) No 2201/2003, (v) introduction of a limited possibility for spouses to choose competent court and (vi) revision of the rule on residual jurisdiction of Council Regulation (EC) No 2201/2003.

It results from the impact assessment that a combination of Community actions is necessary to tackle the various problems. The report advocates a revision of Council Regulation (EC) No 2201/2003 including a harmonisation of conflict-of-law rules with a limited possibility for the spouses to choose the applicable law, the introduction of prorogation and a revision of the rule of residual jurisdiction in Article 7.

The Commission carried out an impact assessment listed in the Work Programme, whose report is accessible on http://europa.eu.int/comm/justice_home/news/consulting_public/news_consulting_public_en.htm.

3) Legal elements of the proposal

- **Legal basis**

The legal basis for this proposal is Article 61 (c) of the Treaty conferring powers on the Community to adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65.

Article 65 confers legislative powers on the Community with regard to judicial cooperation in civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market. Article 65 (b) explicitly mentions measures promoting the compatibility of conflict-of-law rules and jurisdiction rules.

The proposal concerns provisions of jurisdiction and applicable law which only come into play in international situations, e.g. where spouses live in different Member States or are of different nationalities. The cross-border requirement in Article 65 is consequently fulfilled.

The Community institutions have a certain margin of discretion in determining whether a measure is necessary for the proper functioning of the internal market. The present proposal facilitates the proper functioning of the internal market since it will eliminate any obstacles to the free movement of persons who are currently faced with problems due to the remaining differences between the national laws with regard to applicable law and jurisdiction in matrimonial matters.

- **Subsidiarity principle**

The objectives of the Proposal cannot be accomplished by the Member States but require action at Community level in the form of common rules on jurisdiction and applicable law. Jurisdiction rules as well as conflict-of-law rules must be identical to ensure the objective of legal certainty and predictability for the citizens. Unilateral action by Member States would therefore run counter this objective. There is no international convention in force between Member States on the question of applicable law in matrimonial matters. The public consultation and the impact assessment have demonstrated that the scale of the problems addressed in this proposal is significant and that it concerns thousands of citizens each year. In light of the nature and the scale of the problem, the objectives can only be achieved at Community level.

- **Proportionality principle**

The Proposal complies with the principle of proportionality in that it is strictly limited to what is necessary to achieve its objectives. The proposed rules on applicable law and prorogation are limited to divorce and legal separation and do not apply to marriage annulment.

It is expected that the present proposal will not entail any additional financial or administrative burdens on citizens and only a very limited additional burden on national authorities.

- **Choice of instrument**

With regard to the type of legislative instrument, the nature and the objective of the proposal require the form of Regulation. The need for legal certainty and predictability calls for clear and uniform rules. The proposed rules on jurisdiction and applicable law are detailed and precise and require no implementation into national law. To leave Member States any margin of discretion for the implementation of these rules would endanger the objectives of legal certainty and predictability.

4) Budgetary implication

The proposal has no implication for the Community budget.

5) Additional information

- **Simplification**

The proposal provides a simplification of administrative procedures for citizens as well as for practitioners.

In particular the harmonisation of conflict-of-law rules would considerably simplify the situation for private parties and practitioners, who will be able to determine the applicable law on the basis of one single set of rules which will replace the existing twenty-four national conflict-of-law rules.

The proposal is included in the Commission's rolling programme for up-date and simplification of the acquis communautaire.

- **Detailed explanation of the proposal**

Chapter II - Jurisdiction

Article 3a

This provision introduces a limited possibility for the spouses to designate by common agreement the competent court ("prorogation") in a proceeding relating to divorce and legal separation. It corresponds to Article 12 of Council Regulation No 2201/2003, which allows the parties to agree on the competent court in matters of parental responsibility under certain conditions.

This enhanced party autonomy will improve legal certainty and predictability for the spouses. The current jurisdiction rules do not allow spouses to apply for divorce in a Member State of which only one of them is a national in the absence of another connecting factor. The new rule will in particular improve access to court for spouses of different nationalities by enabling them to designate by common agreement a court or the courts of a Member State of which one of them is a national. This possibility applies to spouses living in a Member State as well as spouses living in third States. Spouses who designate a competent court may also avail themselves of the possibility to choose the applicable law pursuant to Article 20a.

Certain formal requirements need to be respected to ensure that both spouses are aware of the consequences of their choice.

The possibility to choose the competent court does not apply to proceedings relating to marriage annulment where party autonomy is considered inappropriate.

Articles 4 and 5 are amended to take account of the new rule on prorogation.

Article 6 is deleted. The public consultation revealed that this provision may cause confusion. It is also superfluous since Articles 3, 4 and 5 describe in which circumstances a court has exclusive competence where a spouse is habitually resident in the territory of a Member State or is a national of a Member State, or in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter States.

Article 7

Article 7 currently refers to the national rules on international jurisdiction in situations where the spouses are not habitually resident in the territory of a Member State and do not have common nationality. However, the national rules are based on different criteria and do not always effectively ensure access to court for spouses although they may have a close connection with the Member State in question. This may lead to situations where no jurisdiction in the EU or in a third State has jurisdiction to deal with an application for divorce, legal separation or marriage annulment. It may also lead to practical difficulties to have the divorce recognised in a Member State since a decision issued in a third State is not recognised in a Member State pursuant to Council Regulation (EC) No 2201/2003, but only pursuant to national rules or applicable international treaties.

The Proposal introduces a uniform and exhaustive rule on residual jurisdiction which replaces the national rules on residual jurisdiction and which ensures access to court for spouses who live in a third States but retain strong links with a certain Member State of which they are nationals or in which they have resided for a certain period. The scope of this rule corresponds to the general rule of jurisdiction in Article 3 and applies to divorce, legal separation and marriage annulment.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission[8],

Having regard to the opinion of the European Parliament[9],

Having regard to the opinion of the European Economic and Social Committee[10],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the European Union as an area of freedom, security and justice in which the movement of persons is ensured. For the gradual establishment of such an area, the Community is to adopt, among others, the measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market.

(2) There are currently no Community rules in the field of applicable law in matrimonial matters. Council Regulation (EC) No 2201/2003 of 27 November 2003 sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, but does not include rules on applicable law.

(3) The European Council held in Vienna on 11 and 12 December 1998 invited the Commission to consider the possibility of drawing up a legal instrument on the law applicable to divorce. In November 2004, the European Council invited the Commission to present a Green Paper on conflict-of-law rules in divorce matters.

(4) In line with its political mandate, the Commission presented a Green Paper on applicable law and jurisdiction in divorce matters on 14 March 2005. The Green Paper launched a wide public consultation on possible solutions to the problems that may arise under the current situation.

(5) This Regulation should provide a clear and comprehensive legal framework in

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8 OJ C , , p. .

9 OJ C , , p. .

10 OJ C , , p. .

matrimonial matters in the European Union and ensure adequate solutions to the citizens in terms of legal certainty, predictability, flexibility and access to court.

(6) With the aim of enhancing legal certainty, predictability and flexibility, this Regulation should introduce the possibility for spouses to agree upon the competent court in proceedings for divorce and legal separation. It also should give the parties a certain possibility to choose the law applicable to divorce and legal separation. Such possibility should not extend to marriage annulment, which is closely linked to the conditions for the validity of the marriage, and for which parties' autonomy is inappropriate.

(7) In the absence of choice of applicable law, this Regulation should introduce harmonised conflict-of-law rules based on a scale of connecting factors to ensure legal certainty and predictability and to prevent "rush to court". Such connecting factors should be chosen as to ensure that proceedings relating to divorce or legal separation be governed by a law with which the marriage has a close connection.

(8) Considerations of public interest should justify the possibility in exceptional circumstances to disregard the application of the foreign law in a given case where this would be manifestly contrary to the public policy of the forum.

(9) The residual rule on jurisdiction should be revised to enhance predictability and access to courts for spouses of different nationalities living in a third State. To this end, the Regulation should set out a harmonised rule on residual jurisdiction to enable couples of different nationalities to seise a court of a Member State with which they have a close connection by virtue of their nationality or their last common habitual residence.

(10) Article 12 of Council Regulation (EC) No 2201/2003 should be amended to ensure that a divorce court designated pursuant to Article 3a has jurisdiction also in matters of parental responsibility connected with the divorce application provided the conditions set out in Article 12 of the same Regulation are met, in particular that the jurisdiction is in the best interests of the child.

(11) Regulation (EC) No 2201/2003 should therefore be amended accordingly.

(12) Since the objectives of the action to be taken, namely to enhance legal certainty, flexibility and access to court in international matrimonial proceedings, cannot be sufficiently achieved by the Member States and can therefore, by reason of scale, be better achieved at Community level, the Community may adopt measures, in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain these objectives.

(13) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

(14) [The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.]

(15) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 2201/2003 is amended as follows:

(1) the title is replaced by the following:

"Council Regulation (EC) N° 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as well as applicable law in matrimonial matters "

(2) the following Article 3a is inserted:

"Article 3a

Choice of court by the parties in proceedings relating to divorce and legal separation

1. The spouses may agree that a court or the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided they have a substantial connection with that Member State by virtue of the fact that

   (a) any of the grounds of jurisdiction listed in Article 3 applies, or

   (b) it is the place of the spouses' last common habitual residence for a minimum period of three years, or

   (c) one of the spouses is a national of that Member State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States.

2. An agreement conferring jurisdiction shall be expressed in writing and signed by both spouses at the latest at the time the court is seised."

(3) In Articles 4 and 5, the terms "Article 3" are replaced by the terms "Articles 3 and 3a".".

(4) Article 6 is deleted;

(5) Article 7 is replaced by the following:

"Article 7

Residual jurisdiction

Where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their "domicile" within the territory of one of the latter Member States, the courts of a Member State are competent by virtue of the fact that:

(a) the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or

(b) one of the spouses has the nationality of that Member State, or, in the case of United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States."

(6) In Article 12 (1), the terms "Article 3" are replaced by the terms "Articles 3 and 3a".

(7) The following Chapter IIa is inserted:

"CHAPTER IIa

Applicable law in matters of divorce and legal separation

Article 20a

Choice of law by the parties

1. The spouses may agree to designate the law applicable to divorce and legal separation. The spouses may agree to designate one of the following laws:

   (a) the law of the State of the last common habitual residence of the spouses insofar as one of them still resides there;

   (b) the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the "domicile" of either spouse;

   (c) the law of the State where the spouses have resided for at least five years;

   (d) the law of the Member State in which the application is lodged.

2. An agreement designating the applicable law shall be expressed in writing and be signed by both spouses at the latest at the time the court is seised.

Article 20b

Applicable law in the absence of choice by the parties

In the absence of choice pursuant to Article 20a, divorce and legal separation shall be subject to the law of the State:

(a) where the spouses have their common habitual residence, or failing that,

(b) where the spouse had their last common habitual residence insofar as one of them still resides there, or failing that,

(c) of which both spouses are nationals, or, in the case of United Kingdom and Ireland, both have their "domicile", or failing that,

(d) where the application is lodged.

Article 20c

Application of foreign law

Where a law of another Member State is applicable, the court may make use of the European Judicial Network in civil and commercial matters to be informed of its contents.

Article 20d

Exclusion of renvoi

The application of a law designated under this Regulation means the application of the rules of that law other than its rules of private international law

Article 20e

Public policy

The application of a provision of the law designated by this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum."

Article 2
Entry into force

This Regulation shall enter into force on twentieth day following that of its publication in the *Official Journal of the European Union.*

It shall apply from 1 March 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels,

For the Council
The President
[…]